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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHASHIKANT JOGANI,

Plaintiff and Appellant,

v.

HARESH JOGANI,

Defendant and Respondent.

SHASHIKANT JOGANI,

Petitioner,

v.

SUPERIOR COURT OF LOS
ANGELES COUNTY et al.,

Respondents;

HARESH JOGANI et al.,

Real Parties in Interest.

B285936

(Los Angeles County
Super. Ct. No. BC290553)

B286432

(Los Angeles County
Super. Ct. No. BC290553)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V. Mooney, Jr., Judge. Reversed. Petition denied.

Reed Smith, Raymond A. Cardozo, Paul D. Fogel and David J. de Jesus; Law Office of Steven R. Friedman, Steven R. Friedman and Michael E. Friedman, for Plaintiff and Appellant.

Morgan, Lewis & Bockius, Thomas M. Peterson and Deborah E. Quick, for Defendant and Respondent.

Shashikant Jogani (Jogani) alleged he and his brother Haresh Jogani (Haresh) entered into an oral partnership agreement under which Haresh would provide capital to purchase real properties that Jogani would identify, acquire and manage until Haresh's investment was recouped, after which Jogani would receive a 50 percent share of the properties' equity.

After extensive law and motion practice, a trial, and six appeals, we remanded the matter on April 22, 2013 for a new trial, which started the three-year clock prescribed by Code of Civil Procedure section 583.320 for bringing matters to trial upon remand.¹ More than four years later Jogani had still not brought the matter to trial, and the trial court dismissed it with prejudice for failure to prosecute.

Jogani argues the trial court abused its discretion in dismissing the matter because the parties agreed to a trial date beyond the three-year deadline. He also argues the court failed to toll the three-year period for the time Haresh suborned perjury and failed to provide discovery.

¹ Undesignated statutory references will be to the Code of Civil Procedure.

We agree with the first contention, and thus reverse the trial court's order. In light of this ruling, Jogani's writ petition is denied as moot.

BACKGROUND

A. Pre-Remittitur Proceedings

Because most of the extensive pre-remittitur procedural history in this case is immaterial for our purposes, we cover it only briefly. Jogani alleged that in 1995 he and Haresh entered into an oral general partnership agreement under which Jogani, an accomplished real estate developer, would identify, acquire and manage new properties on behalf of the partnership. Haresh would provide capital to acquire the properties and pay Jogani minimal compensation. After Haresh recouped his investment plus a 12-percent-per-year return, Jogani would receive half of all future profits and half the value of the partnership's portfolio. Haresh later breached the agreement by removing Jogani from management of the partnership portfolio and refusing to honor his partnership interest.

Jogani sued Haresh and several of his holding companies—J.K. Properties, Inc., H.K. Realty, Inc., Commonwealth Investments, Inc., Mooreport Holdings Limited, and Gilu Investments Limited—the Haresh Parties) for damages, dissolution of the partnership, an accounting, injunctive relief, institution of a constructive trust, and appointment of a receiver to manage the partnership portfolio. In September 2004, the trial court granted summary judgment against Jogani, but we reversed the judgment. (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158 (*Jogani I*).

On remand, the trial court granted summary adjudication against Jogani on most of his claims, and the matter proceeded only in quantum meruit.²

Jogani's quantum meruit claim was tried to a jury, which returned special verdicts in his favor and awarded him approximately \$65 million. The trial court denied Haresh's motion for judgment notwithstanding the verdict but granted his motion for new trial, finding the jury committed misconduct. Both sides appealed, and we affirmed the order granting a new trial and reversed the order granting summary adjudication against Jogani on his contract claims. (*Jogani v. Jogani* (Dec. 5, 2012, B222561 consol. with B228875) [nonpub. opn.] (*Jogani IV*).)³

The remittitur was filed in the superior court on April 22, 2013, giving Jogani until April 22, 2016 to bring the matter to trial. (§ 583.320, subd. (a).)

B. Post-Remittitur Proceedings

In July 2013, Jogani propounded discovery on the Haresh parties, who objected and provided no substantive responses.

In October 2013, Jogani's attorney died without having addressed Haresh's discovery responses other than to obtain extensions of time to move to compel responses. In mid-November the attorney's law firm advised Jogani it could not

² Mandate proceedings in which we held that Jogani's unjust enrichment and quantum meruit claims were duplicative are not directly relevant to this appeal. (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911 (*Jogani II*).)

³ Intervening writ proceedings are not directly relevant to this appeal. (*Jogani v. Superior Court* (July 28, 2010, B224398) [nonpub. opn.] (*Jogani III*).)

handle the litigation, and in December 2013 he retained Steven R. Friedman to represent him. Friedman sought Jogani's files from the former law firm and in January 2014 negotiated a two-week extension to move to compel discovery responses.

During the alleged partnership's business activities Steven Glass, a transactional attorney, had represented Jogani, Haresh, and the alleged partnership's holding companies by negotiating on their behalf with third parties in real estate transactions. When the business relationship soured and Jogani filed this lawsuit, Glass at first attempted to mediate the dispute between the brothers but ultimately ceased representing Haresh and continued to represent only Jogani, assisting Friedman with the lawsuit.

On February 18, 2014, Haresh moved to disqualify Glass from acting as counsel for Jogani. The trial court denied the motion but we reversed, holding that Glass's representation of Jogani violated the Rule of Professional Conduct governing successive conflicting representation and required that he be disqualified from participating in this litigation. (*Jogani v. Jogani* (July 24, 2015, B257750) [nonpub. opn.] (*Jogani V.*))

While these disputes were ongoing, Friedman in May 2014 sought depositions and documents to prove the existence and assets of the alleged partnership.

In August 2014, after receiving hundreds of boxes of documents he felt were under-responsive, Friedman moved to compel further responses. The trial court vacated the pending trial date, set trial for June 2015, and appointed a discovery referee. The referee issued a report directing the Haresh defendants to respond to discovery, which the trial court adopted in March 2015.

By April 2015, the Haresh parties had yet to respond to Jogani's May 2014 discovery requests.

The parties stipulated to continue the June 2015 trial date to March 2016 in light of the extensive discovery disputes and discovery motion practice, but the Haresh defendants successfully challenged the trial judge pursuant to section 170.6, which resulted in reassignment of this and a related case to Judge Mark Mooney and continuation of the trial date to September 2016.

In the meantime, Friedman moved for compliance with the March 2015 discovery order, and a hearing was set for October 2015.

In September 2015, after remand from our decision affirming the disqualification of Glass, Haresh moved to disqualify Friedman's law firm as well, arguing the same considerations that required Glass's disqualification required the vicarious disqualification of any firm he assisted. The trial court denied the motion and we affirmed, holding that no basis existed to extend Glass's disqualification to the firm. (*Jogani v. Jogani* (Oct. 25, 2016, B268162) [nonpub. opn.] (*Jogani VI*).)

In October 2015, the trial court granted Friedman's motion to compel compliance with the March 2015 discovery order.

At a November 2015 trial setting conference, Haresh represented there was "no way" trial could begin in September 2016 because discovery would not be completed and Haresh's counsel had another trial set for October 2016. Haresh's counsel agreed with Friedman "that November would be better."

Accordingly, the trial court set trial for November 7, 2016.

In November 2015, eight months after the March discovery order, Haresh made 1.3 million pages of documents available but

permitted only on-site copying for only seven hours a day. Jogani moved to expedite the copying but the trial court never ruled on the motion. Copying the documents ultimately took Jogani's vendor several months rather than the several weeks anticipated by the vendor should copying be permitted offsite.

Jogani's accounting experts eventually declared that Haresh's production was nonresponsive on the issue of damages.

In October 2016, Jogani moved to continue the November 7 trial date to March 2017 in light of unresolved discovery issues. The Haresh defendants agreed to a continuance but requested a date after lead counsel's June 2017 trial in another matter.

The trial court noted that "everyone is okay with continuing the trial except for me," but because the court was "outvoted" by the parties, it set trial for July 17, 2017, more than a year beyond the April 22, 2016 deadline established by section 583.320 and our remand in *Jogani IV*.

By October 2015, Chetan and Rajesh Jogani, previously dismissed as defendants from this litigation, had filed separate lawsuits against Haresh alleging breach of a partnership agreement. They dismissed their complaints after stipulating to reentry into this case as defendants, and then cross-complained against all parties, seeking declaratory relief against Jogani—asserting he was a partner and a necessary party—and damages against Haresh.

In April 2017, Jogani produced several audio-recorded discussions among the brothers in Gujarati (an Indian dialect) in which Haresh allegedly admitted that which he had been denying throughout the litigation—the existence of a partnership.

In May 2017, Haresh moved to continue the July 17 trial to March 5, 2018 "or later" on the ground that the recordings

necessitated additional discovery and investigation. Regarding the three-year deadline, Haresh's counsel denied he was seeking to set up a dismissal motion and stated that "any motion to dismiss would fail" because "[i]t is common sense that, where the trial court grants a continuance at the request of the defendants, it would be 'impracticable' for Plaintiff to bring the action to trial during the intervening time period."

At the same time, Jogani moved for terminating sanctions for Haresh's failure to produce documents responsive on the issue of damages. The trial court deferred ruling on the motion in light of Haresh's counsel's invitation to Friedman to return to the documents warehouse to copy more discovery. At the warehouse Friedman was given 107 additional boxes of documents, including several boxes with tax returns, but no corporate-level financial documents. Friedman returned to the court, which ordered Haresh to produce persons most knowledgeable about his finances for deposition. After those depositions, Friedman represented to the court that the deponents had essentially admitted they had never been tasked with producing documents from 1994 to 2010, years during which the alleged partnership was formed and operated.

Jogani's accounting experts opined that the discovery finally produced in June 2017 largely and for the first time substantiated his damages claims.

In June 2017, Haresh's counsel moved to withdraw from the litigation and to continue the trial for 120 days to enable new attorneys to prepare. Regarding the three-year dismissal statute, counsel stated there was "no credible danger of [Jogani] facing a motion to dismiss for failure to prosecute merely because of a trial continuance following from the Firm's withdrawal."

The trial court denied Haresh's counsel's motion to withdraw, Haresh's request for a continuance, and Jogani's motion for terminating sanctions. It stated it could not determine whether Haresh had complied with discovery orders without "going through all these boxes," which it declined to do, and stated, "I think it's time we just have this case heard on the merits." The court left the issue of sanctions open if the trial revealed that Haresh had withheld or spoliated evidence.

C. Motion to Dismiss

On Friday, July 14, 2017, the Haresh Parties applied ex parte to dismiss Jogani's claims with prejudice for failure to timely bring them to trial. The trial court treated the application as a motion, shortened time for it to be heard, and instructed Jogani to respond by Monday, July 17. Jogani objected to the procedure but timely filed a substantive opposition to the motion.

In the meantime, Haresh's counsel petitioned us for a writ overturning the trial court's order denying its motion to withdraw. (*Keller/Anderle LLP v. Superior Court*, B283744.) We ordered that trial be stayed through July 19, 2017, and the trial court continued the hearing on Haresh's dismissal motion to July 20.

The trial court found that Jogani and Friedman had been diligent and "weren't asleep at the switch." However, it found that Krane's law firm could have continued to prosecute the case after Krane's death, Friedman could have obtained necessary information about the case from court files rather than waiting for the Krane firm to produce it, and his time spent getting up to speed on the case was not a valid ground for tolling the three-year limitations period. The court found Haresh's disregard of discovery orders warranted no tolling because although the case

“was complicated [and] discovery was difficult to get . . . the three-year rule is still the three-year rule,” and obtaining discovery is an “ordinary in[cident] of litigation.” Finally, the court found that Haresh’s accedence to multiple continuances did not constitute waiver of the three-year period.

In its statement of decision, the trial court found the three-year limitations period was tolled for 62 days for Haresh’s section 170.6 challenges, 20 days for writ review of the denial of Haresh’s summary adjudication motion, 44 days for Haresh’s motion to disqualify Friedman’s firm, and 86 days for Jogani’s efforts to obtain new counsel after Krane’s death, for a total of 212 days. The court declined to toll the limitations period for 162 days of work lost between the remittitur and Krane’s death or for an additional 90-120 days Jogani sought for Friedman’s firm to acquaint itself with the litigation. The court also found that as a “matter of law, stipulated continuances and mutually agreed-upon trial dates do not estop a defendant from moving to dismiss for violation of the prosecution statutes.”

The trial court found that even with 212 days of tolling, Jogani failed to bring the action to trial within three years of our April 2013 remittitur. It therefore ordered the action dismissed and denied Jogani’s motions for reconsideration and new trial.

Jogani timely appealed from the dismissal order and filed a companion writ petition seeking review of the order.

DISCUSSION

I. Jogani’s Appeal

A. General Principles

Section 583.320 mandates that an action remanded to a trial court after reversal of a judgment on appeal be brought to trial “within three years after the remittitur is filed by the clerk

of the trial court.” (§ 583.320, subd. (a)(3).) If this deadline is not met, the action “shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties” (§ 583.360, subd. (a).) These requirements “are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.” (§ 583.360, subd. (b).)

The statutes serve to “prevent[] prosecution of stale claims where defendants could be prejudiced by loss of evidence and diminished memories of witnesses” and “to protect defendants from the annoyance of having unmeritorious claims against them unresolved for unreasonable periods of time.” (*Lewis v. Superior Court* (1985) 175 Cal.App.3d 366, 375.) In construing them, “the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action. . . .” (*Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1090 (*Gaines*).)

It is a plaintiff’s duty to exercise reasonable diligence to insure a case is brought to trial within statutory time constraints. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 434; *Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1270.)

Certain events toll the three-year statute. For example, under subdivision (b) of section 583.340 the statute is tolled when “[p]rosecution or trial of the action was stayed or enjoined.” Under subdivision (c) of section 583.340 the statute is tolled when “[b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile.”

“In deciding whether these exceptions are met, the court must consider ‘ “all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. [Citations.] The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case.” ’ ” (*Gaines, supra*, 62 Cal.4th at p. 1100.) “ ‘The question of impossibility, impracticability, or futility is best resolved by the trial court, which “is in the most advantageous position to evaluate these diverse factual matters in the first instance.” [Citation.] The plaintiff bears the burden of proving that the circumstances warrant application of the . . . exception. [Citation.] . . . The trial court has discretion to determine whether that exception applies, and its decision will be upheld unless the plaintiff has proved that the trial court abused its discretion. [Citations.]’ [Citation.] Under that standard, [t]he trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.’ ” (*Ibid.*)

A reasonably diligent plaintiff should be able to bring the case to trial within the relatively lengthy period of three years after remand notwithstanding delays incurred as a result of the “ordinary incidents of proceedings.” (*Gaines, supra*, 62 Cal.4th at p. 1101.) Examples of the ordinary incidents of proceedings are awaiting disposition of demurrer, amendment of pleadings, or placement on the court’s calendar. (*Ibid.*) “To hold otherwise would allow plaintiffs to litigate piecemeal every period, no matter how short, in which it was literally impracticable to try

the case, thus rendering the statute “‘utterly indeterminate, subjective, and unadministerable.’” (*Ibid.*)

“The parties may extend the time within which an action must be brought” either through a “written stipulation” or an “oral agreement made in open court, if entered in the minutes of the court or a transcript is made.” (§ 583.330.) Any ambiguity in an agreement extending the time to bring an action to trial is construed in favor of a trial on the merits. (See *Dowling v. Farmers Ins. Exch.* (2012) 208 Cal.App.4th 685, 694.)

A stipulation by the parties that extends the time for trial beyond the three-year period, absent a showing that the parties intended otherwise, extends the three-year period. (Cf. *Gaines, supra*, 62 Cal.4th at p. 1092; see also *Miller & Lux Inc. v. Superior Court* (1923) 192 Cal. 333, 337-338 [“A written stipulation . . . postponing the case to a time beyond the statutory period, would have the effect of extending the statutory period to the date to which the trial was postponed”]; see also *J.C. Penney Co. v. Superior Court* (1959) 52 Cal.2d 666, 669 [“To serve as such an extension the stipulation must be written and extend in express terms the time of trial to a date beyond the five-year period or expressly waive the right to a dismissal”]; *Lewis v. Neblett* (1957) 48 Cal.2d 564; *Rio Vista Min. Co. v. Superior Court* (1921) 187 Cal. 1, 6; *Koehler v. Peckham* (1936) 11 Cal.App.2d 481, 483; *In re Thatcher’s Estate* (1953) 120 Cal.App.2d 811, 814 [“where the parties make a stipulation that the case may be set for trial, even though such stipulation is made more than five years after the action was filed, it is error to grant a motion to dismiss the action for failure to bring the same to trial”].)

“When a defendant selects a trial date beyond the three-year period, he shows his willingness to excuse delay and his

apparent satisfaction with his state of preparedness for trial.” (*Holder v. Sheet Metal Worker’s Int’l Assn.* (1981) 121 Cal.App.3d 321, 327.)

B. The Parties Agreed to Extend the Three-Year Deadline

Here, our remittitur remanding the matter for a new trial was filed on April 22, 2013. Jogani therefore had until April 22, 2016 to bring the matter to trial.

At a trial setting conference in November 2015, with both parties and counsel present, the court proposed September 2016 as the trial date, but Haresh argued for a later date because discovery would not be complete and his counsel needed to prepare for another trial. The parties and court then agreed to a November 7, 2016 trial date. That agreement moved the April 22, 2016 deadline to November 7.

In October 2016, Jogani moved to continue trial, with which Haresh’s counsel agreed. The trial court granted the continuance and set trial for July 17, 2017, stating that “everyone is okay with continuing the trial.” (And in May 2017, Haresh sought unsuccessfully to continue the trial to March 2018 due to the need for additional discovery and conflicts with his counsel’s trial schedule.)

Because Haresh twice agreed to continue a trial past the statutory deadline, the policies favoring trial on the merits and the honoring of parties’ agreements compel us to conclude that the deadline was extended to the new agreed-upon trial date of July 17, 2017. His motion to dismiss the action for failure to bring it by April 2016 should therefore have been denied.

Haresh argues his agreement twice to continue trial was nothing more than cooperation to identify workable dates, and

absent an express stipulation constituted no waiver of the statutory deadline. He argues it would be unreasonable to require a defendant “to vociferously and implacably oppose all trial continuances and then, in the event the trial court nonetheless sets a new trial date, refuse to participate in a scheduling colloquy, thereby risking sanctions or contempt.” This is not what happened. On the contrary, at all stages Haresh acceded to, sometimes urged, and instrumentally facilitated the trial court’s continuances, all while professing that the three-year deadline could not be successfully invoked under such circumstances.

Section 583.330 “provides that the parties may extend the five-year period during which an action must be brought to trial by written stipulation or oral agreement made in open court. [Citation.] The reason for the requirement [is to require] . . . ‘clear and uncontrovertible evidence . . . that the statutory time was deliberately intended to be extended by both parties.’ ” (*Gaines, supra*, 62 Cal.4th at p. 1093.)

There was such an oral agreement here. It would be unreasonable to permit a defendant to participate in scheduling colloquies without objection, urge and agree to trial continuances, and make assurances that the limitations period will not be invoked but then literally on the eve of trial obtain dismissal for failure to meet the three-year deadline.

II. Haresh Defendants’ Cross-Appeal

After we twice reversed summary adjudication, the Haresh Defendants moved a third time for summary adjudication on the ground that because the sole purpose of the alleged partnership agreement could be accomplished only illegally, i.e., by

defrauding lenders, the agreement was unenforceable. The trial court denied the motion, and the Haresh Defendants appeal.

A. Judgment Debtor Proceedings

Jogani was himself a defendant in lawsuits arising from his earlier business pursuits, resulting in several judgments against him and institution of judgment debtor proceedings. The following facts are taken from our opinion in *Jogani I* (“Shashi” refers to Jogani):

“By the mid-1990’s, the equity in Shashi’s real estate holdings had fallen from \$100 million to a negative \$50 to \$70 million. There were several lawsuits against him, brought by tenants, creditors, employees, and an insurance company. By 1998, many creditors had obtained judgments against him.

“At his deposition in this case, taken in April and May 2004, Shashi testified he became a general partner in the Partnership when it was formed in April 1995, as did his brothers. Since April 1995, Shashi continuously has been a part owner of the Partnership, which owns the real estate acquired from him as well as the properties subsequently purchased as a result of his consulting work. The real estate was nominally held by the [holding companies], such as J.K. Properties and H.K. Realty. Since April 1995, Shashi has also continuously been a part owner of the [holding companies]. Haresh supervised the operations of the Partnership and the [holding companies] on behalf of the other brothers. If Haresh had tried to sell J.K. Properties at any point, Shashi would have filed suit based on his 50 percent ownership interest in the Partnership, which owned J.K. Properties.

“In May 1997, the plaintiff in *Cappucci v. Jogani* (Super.Ct.L.A.County, 1996, No. BC143725) (*Cappucci*) secured a

judgment against Shashi of around \$639,000. The plaintiff questioned Shashi at a judgment debtor examination held on February 23, 1998, and March 9, 1998, at the county courthouse.

“At the judgment debtor exam, Shashi was asked to identify ‘any entity in which you’ve ever owned any interest.’ He did not mention the Partnership or the Partnership Entities. He specifically stated he did not have ‘any interest’ in J.K. Properties or H.K. Realty. Shashi testified that none of his family members owned any real property with him, nor did they own any real property with an entity in which he held an interest. When asked if he was presently a party to ‘any kind’ of contract or agreement, he answered, ‘No.’ Shashi was also asked, ‘Are you involved in any joint ventures.’ He replied, ‘I wish, no.’ He later testified in this case that he believed ‘joint venture’ is ‘the same as Partnership.’

“After the judgment debtor exam, the plaintiff in *Cappucci* did not attempt to reach any interests Shashi had in the Partnership or the [holding companies], and she settled for \$50,000. More specifically, one of the [holding companies] purchased the \$639,000 judgment for that sum.

“In or about 1996, the plaintiff in *Weyerhauser Financial Investments v. Jogani* (Super.Ct.L.A.County, 1996, No. BC143926) (*Weyerhauser*) obtained a judgment against Shashi for about \$644,000. In connection with Weyerhauser, Shashi was questioned at a judgment debtor examination conducted on March 23, 1998, and April 13, 1998, at the county courthouse.

“At the exam, Shashi was asked if he was ‘currently a partner in any partnership.’ He said he was a 1 percent limited partner in four or five limited partnerships. He identified each by name. He did not mention the Partnership. Shashi testified

that Haresh was the owner or a part owner of J.K. Properties and H.K. Realty. When asked, '[D]o you have any interest . . . in any companies that are owned directly or indirectly by Haresh Jogani,' Shashi replied, 'Absolutely not. Absolutely not.' In response to the question, 'Do you have any interest in re-acquiring any of the properties that were purchased by any company that Mr. Haresh Jogani controls,' Shashi said, 'No.'

"After the exam, the plaintiff in *Weyerhauser* did not make any effort to reach Partnership-related assets and accepted \$50,000 for the \$644,000 judgment. Haresh sent the settlement money to Shashi's attorney and charged it to the partnership.

"The plaintiffs in *Cappucci* and *Weyerhauser* were not alone. A plaintiff in a third action obtained multiple judgments against Shashi totaling around \$696,000 and settled for \$50,000. In a fourth case, the plaintiff recovered a judgment of \$878,000 and accepted \$62,000.

"At the judgment debtor exams in *Cappucci* and *Weyerhauser*, Shashi believed that the questions were addressed to what he owned as of that time—in his words, 'something' the judgment creditors could 'put [their] hands on.' He did not believe the questions covered a future or contingent interest, in part because he thought it had no present value. Shashi did not think he had an ownership interest in the Partnership in 1998 because he was not entitled to his 50 percent share until his brothers had recouped their investment plus a 12 percent return—which did not happen until three years later. Shashi had been advised by counsel before the debtor exams that his interest in the Partnership had not 'vested,' so 'you don't have a present ownership of anything.' But the attorney also said Shashi was presently a partner in the Partnership and a party to

the Partnership Agreement. Shashi had some control over when his Partnership interest vested because he alone controlled the Partnership's investment strategy.

“As Shashi testified at his deposition, the ‘contingent’ nature of his interest in the Partnership allowed his brothers to obtain loans for which he could not qualify. Based on past experience, certain financial institutions did not want to loan money to a company in which Shashi owned an interest. Haresh was able to obtain loans through the [holding companies] and related companies because Shashi did not have a ‘present’ ownership interest in the borrowing entity; he was only a consultant.

“According to Shashi's personal attorney, in 1995, Haresh wanted to continue Shashi's real estate business and to have Shashi control it but ‘didn't want the appearance of Shashi having an interest that creditors could attack.’ Haresh was actively involved in creating and structuring the Partnership and the [holding companies]. Haresh also approved of ‘everything that was done regarding satisfaction of judgments and buying judgments.’ Shashi and Haresh believed that if a lender knew about the existence of the Partnership, the [holding companies] might have difficulty obtaining loans.” (*Jogani I, supra*, 141 Cal.App.4th at pp. 166-168.)

B. First Motion for Summary Judgment

Relying on Jogani's judgment debtor testimony, defendants brought two successive summary judgment motions. In the first, they argued the doctrine of judicial estoppel prevented Jogani from claiming in this case that which he had denied under oath in the judgment debtor examinations. He thus could not claim an interest in any real estate partnership. The trial court agreed,

and granted summary judgment on the ground that judicial estoppel barred the lawsuit.

We reversed. We acknowledged that Jogani had “taken totally inconsistent positions in separate judicial proceedings. In the 1998 judgment debtor examinations, he testified to the effect that, as of that time, he was not a partner in the Partnership, did not have or own ‘any interest’ in the [holding companies], did not own any real property with family members, and was not a party to any kind of agreement. At his 2004 deposition in this case, Shashi testified in essence that *since 1995*, he continuously has been a general partner in the partnership, has had an ownership interest in the [holding companies], has been a part owner—with his brothers—of the Partnership’s real properties, and has been a party to the Partnership Agreement. And, according to the deposition, if Haresh had tried to sell one of the [holding companies] at any time *after 1995*, Shashi would have filed suit based on his interest in that entity. [¶] Nor were these inconsistencies the result of ignorance or mistake on Shashi’s part. [Citation.] At the 1998 debtor exams, when Shashi’s assets were at stake, he denied any and all interests, including membership and ownership, in the Partnership, the [holding companies], and the entities’ real estate holdings. In 2004, when he stood to gain \$250 million, Shashi testified in deposition that his interests, membership, and ownership dated back to 1995, three years before the debtor exams.” (*Jogani I, supra*, 141 Cal.App.4th at pp. 171-172.) We concluded the inconsistencies were deliberate. (*Id.* at p. 172.)

We nevertheless held that judicial estoppel did not apply because no “judge or referee considered or resolved any objection, dispute, or claim in connection with the [debtor] exams. The

transcripts [did] not show that a judge or referee said anything or that anything was said to a judge or referee. The exams were conducted by counsel for the judgment creditors. No orders were issued. [And d]efendants [did] not assert that a transcript of the testimony was lodged or filed with the courts that ordered the exams. [¶] Because the courts in the judgment debtor proceedings did not consider the substance of Shashi's testimony, much less adopt it or accept it as true, his allegations and deposition testimony in this action 'introduce[d] no "risk of inconsistent court determinations," . . . and thus pose[d] little threat to judicial integrity.' [Citation.] The outcome in this action [could not] possibly create ' "the perception that either the first or the second court was misled" ' [citation], given that the first courts did not rely on the testimony at all." (*Jogani I, supra*, 141 Cal.App.4th at p. 174, fn. & italics omitted.)

C. Second Motion

In 2007, defendants again moved for summary judgment or adjudication, this time arguing that the rule set forth in *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20-22, which prevents a party from avoiding summary judgment by presenting evidence that contradicts admissions made during discovery, barred Jogani from offering evidence that would contradict his 1998 judgment debtor testimony. Relying in part on the *D'Amico* rule, the trial court granted summary adjudication on all causes of action except quantum meruit and unjust enrichment. We again reversed. (*Jogani IV, supra*, B222561.)

D. Current Motion

On January 9, 2014, the Haresh Defendants again moved for summary adjudication of Jogani's causes of action for breach of contract, breach of fiduciary duty, fraud, conspiracy to defraud,

and partnership dissolution, all of which depend on the existence of an enforceable partnership agreement. Defendants relied on Jogani's own testimony in this case that he failed to disclose the partnership to third party lenders when applying for loans. When asked, "did you disclose th[e] partnership" on loan applications, he replied, "No." And when asked why he had represented to Freddie Mac that he was "not in any way a part of the" partnership and would have no ownership interest in property it acquired, he testified he made this statement to conceal his foreclosures.

Regarding the consulting agreement, Jogani testified its purpose was to provide a cover story for his involvement in the partnership without admitting he was an actual partner. He stated, "Lenders don't trust me. Lenders wanted to see in the black and white, in case what is my, relationship is And that's why this document was prepared."

The Haresh Defendants argued no enforceable agreement existed because Jogani had admitted that the alleged agreement was entered into in secret with the effect of concealing his ownership interest in the partnership's assets from his creditors, the tax authorities, and potential lenders, and the purpose of his consulting agreement was to provide to lenders a plausible explanation for his involvement in the business as a non-owner. Defendants argued these admissions established that the partnership agreement was illegal, which made it unenforceable pursuant to Civil Code sections 1550 (a contract must have a lawful object) and 1667(1) (a contract with the object of violating an express provision of law is unlawful) and *Stockton Morris Plan Co. v. California Tractor & Equip. Corp.* (1952) 112 Cal.App.2d 684, 690 ["If the effect of the agreement is to accomplish an

unlawful purpose . . . the agreement will be declared illegal regardless of the intention of the parties”].

Jogani argued in opposition that the purpose of the partnership was to acquire and manage real estate, not to defraud his creditors. He offered his own declaration that the purpose was to “accumulate real estate for long term investment” by engaging in the lawful business of real estate selection, acquisition, rehabilitation and holding for a better market.” He declared that the \$2 million to \$3 million in creditors’ claims constituted such a small fraction of the partnership’s overall value that their avoidance was not the formative purpose of the partnership. Finally, he declared that the partnership never defaulted on a debt or avoided any taxes.

Jogani also offered declarations from executives of two of the holding companies stating that the object and purpose of the partnership was to acquire and manage property legally, they “never received instructions from Haresh or [Jogani] to conduct any illegal activity as part of the partnership,” and an IRS audit revealed no misconduct or tax fraud.

Finally, Jogani offered excerpts from Glass’s deposition testimony in which he stated, “We weren’t trying to avoid creditors.”

The trial court denied summary adjudication on the ground that Jogani’s “previous deposition testimony is equivocal as to whether there was an illegal intent or purpose” and his evidence in opposition to the motion “explains the intent and purpose of the alleged partnership agreement and transactions related thereto: this evidence does not contradict [Jogani’s] previous deposition testimony.”

E. Discussion

The Haresh Parties contend no triable issue exists as to whether Jogani's contract-based claims are based on an illegal, unenforceable contract, and are thus barred by public policy. We disagree.

1. General Principles

To obtain summary judgment or adjudication a party must establish the merit of his case "as a matter of law" (§ 437c, subd. (c)), i.e., that the available evidence raises no material issue that a trier of fact could resolve in favor of the party opposing the motion. The function of the motion is to cut through the pleadings to determine whether trial is necessary to resolve the dispute. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A moving defendant may establish a right to summary judgment by showing the plaintiff lacks evidence to sustain one or more elements of the cause of action pleaded. (§ 437c, subd. (o)(2).) "Every meritorious motion thus rests on establishing two propositions: The opposing party is unable to present evidence in support of a specified fact, and that fact is essential to establish his cause of action or to overcome a defense. The first proposition may of course be established by uncontroverted affirmative proof that the specified fact does not exist, but it may also be established by showing that the opposing party bears the burden of proof with respect to the specified fact and that he has no evidence with which to carry that burden. In either case, once the first proposition is established—the unprovability of the specified fact—the only question presented is whether that fact is indeed vital to the opponent's case. This is a question of law for the court. If the answer is affirmative—if there is no way for the opposing party to prevail without the specified fact—the movant

is entitled to judgment ‘as a matter of law.’” (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 756.)

A plaintiff can defeat a defense motion for summary judgment by showing the defense evidence itself permits conflicting inferences as to the existence of the specified fact, by presenting evidence of the fact’s existence, or by showing the fact is not essential to the lawsuit. (See § 437c, subds. (c), (p)(1); see also *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

We independently review the trial court’s decision, considering the admissible evidence offered in connection with the motion and the inferences that evidence reasonably supports. We liberally construe the evidence in support of the opposition and resolve doubts concerning the evidence in favor of the opposing party. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.)

2. Existence of an Enforceable Contract is a Triable Issue

The first step in analyzing a motion for summary judgment is to identify the elements of the challenged causes of action. Jogani’s linchpin cause of action was for breach of contract, the elements of which are the existence of an enforceable contract, the plaintiff’s performance or excuse for nonperformance, the defendants’ breach, and resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) Jogani alleged he and Haresh entered into an oral, five-person partnership agreement, which Haresh breached. He alleged the agreement created fiduciary duties, which Haresh also breached, and Haresh had no intention of honoring the terms of the agreement when he endorsed them, which constituted fraud. All causes of action except quantum meruit

thus depended on the formation of an enforceable partnership agreement, and defendants' motion contested only this element. They were thus entitled to summary adjudication if they demonstrated Jogani's inability to establish enforceability of the contract.

An agreement must have a lawful objective when made. (See Civ. Code, §§ 1550, 1596.) Courts will generally not enforce an agreement whose sole object is unlawful. (Civ. Code, § 1598; *Tiedje v. Aluminum Taper Milling Co., Inc.* (1956) 46 Cal.2d 450, 453-454 ["A contract made contrary to public policy or against the express mandate of a statute may not serve as the foundation of any action, either in law or in equity"].) "[I]f a contract can be performed legally, a court will presume that the parties intended a lawful mode of performance." (*Redke v. Abraham Silvertrust* (1971) 6 Cal.3d 94, 102 (*Redke*)). This presumption may be overcome by demonstrating that the party seeking to enforce the contract intended an illegal mode of performance. (*Id.* at pp. 103-104.)

Defendants relied on Jogani's own testimony that he at times failed to disclose the partnership to third party lenders when applying for loans, and the consulting agreement was designed as a cover for his partnership activities. This evidence arguably shifted the burden to Jogani to present rebutting evidence sufficient to establish a triable issue.

He did so. Jogani offered declarations from himself and two holding company executives, and deposition testimony from his former attorney, to the effect that the purpose of the partnership was to obtain, develop and manage real property, and at no time were any laws broken, credit defaulted, or lenders

defrauded. On this evidence, the facial purpose of the agreement was unambiguous and lawful.

Defendants argue that because Jogani's credit history rendered him unable to purchase real estate, the sole purpose of the agreement must have been to purchase real estate unlawfully, i.e., by defrauding lenders. But viewing the facts in a light most favorable to Jogani, the non-moving party, the evidence is ambivalent as to whether and to what extent he intended to act unlawfully. Although some testimony indicated he intended to defraud lenders, other testimony indicated he simply misunderstood the nature of his partnership interests. And while Jogani might have known he would be unable to purchase property without concealing his interest in it, it may also be inferred that he believed concealment of his interest would be more a facilitative measure than a necessary one. Where the enforceability of a contract depends on the mens rea of its parties, and the evidence is conflicting or admits of more than one inference, it is for the trier of fact to determine whether the parties had proper or improper aims. Summary adjudication was therefore properly denied.

Defendants for the third time argue Jogani's declaration was inadmissible under the *D'Amico* rule because it contradicted his testimony in the judgment debtor exams in *Cappucci* and *Weyerhauser*. We summarily reject the contention for reasons discussed in detail in *Jogani I* and *Jogani IV*.

Defendants argue that a desire to acquire property does not create a triable issue of fact as to whether the partnership agreement was kept secret to defraud lenders. Perhaps not, but the material issue here is the agreement's purpose, not its

nondisclosure to third parties. Wrongfully concealing an agreement does not make it unlawful.

Quoting *Stockton Morris Plan Co. v. California Tractor & Equipment Corp.*, *supra*, 112 Cal.App.2d 684, defendants argue that “agreements which, though legal when standing by themselves, are merely steps intended for the accomplishment of an illegal object will be declared illegal. If the effect of the agreement is to accomplish an unlawful purpose, however, the agreement will be declared illegal regardless of the intention of the parties.” (*Id.* at p. 690.) *Stockton* is inapposite, as there the sole effect of the agreement was illegal—a putative party had no capacity to enter into a valid contract. Here, in contrast, the alleged partnership agreement had several objectives—to procure, manage and develop real estate—at least one of which was admittedly lawful. Even if Jogani knew there was no way he could procure any real estate lawfully, a point on which, as stated above, the evidence is equivocal, no evidence suggests that other partnership aims could be accomplished only unlawfully as well. To reiterate, “if a contract can be performed legally, a court will presume that the parties intended a lawful mode of performance.” (*Redke, supra*, 6 Cal.3d at p. 102.)

DISPOSITION

The judgment is reversed. Jogani's petition for a writ of mandate is denied. The trial court's order denying summary adjudication is affirmed. Appellant is to recover costs on appeal.
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.